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IN THE

Supreme Court of the United States

No. 844

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

Supreme Court of the United States

October Term, 1958.

No. .....

EDWARD SIMON WEIN,

Petitioner,

vs.

STATE OF CALIFORNIA

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioner, Edward Simon Wein, prays that a writ of certiorari issue to review a judgment of the Supreme Court of the State of California whereby a petition for a writ of habeas corpus or, in the alternative, for a writ of error *coram nobis* was denied by the said Supreme Court of the State of California.

Opinion Below.

The Supreme Court of California rendered no opinion. The order was made February 18, 1959, and is to be found in the Minutes of 51 A.C. No. 18, p. 1 of Minutes, and is as follows: "Crim 6413 In re Wein on Habeas Corpus. Petition denied."

Jurisdiction.

1. The judgment of the Supreme Court of California was dated and entered February 18, 1959, and is to be found in the Minutes of 51 A.C. No. 18, p. 1 of Minutes.

2. No extension of time within which to petition for certiorari has been requested.

3. The petitioner Wein has by order of the Superior Court of the State of California, in and for the County of Los Angeles, been ordered executed pursuant to the judgment and will be executed June 5, 1959 by the Warden of San Quentin Prison, San Quentin, California, unless such execution is restrained by this Court.

4. The statutory provisions believed to confer upon this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 2101(d) and Rule 22(1) of this Court.

QUESTION PRESENTED FOR REVIEW.

The Representation of the Defendant by His Trial Counsel Was Constitutionally Inadequate and Did Not Meet the Exacting Standard of Representation Required Under the Fourteenth Amendment to the United States Constitution. The Defendant Was Denied Adequate Representation of Counsel.

The petitioner has been denied the right of a hearing at which time and place to offer evidence to show the inadequacy of his representation by trial counsel; the facts surrounding the withdrawal of the plea of not guilty by reason of insanity which demonstrate that he was not advised of the effect of his waiver, and at such hearing, if one be granted, the petitioner should be entitled to show all of the facts and circumstances surrounding his

representation and the inadequacy thereof. To this time he has been denied a hearing at which to offer evidence to show the gross inadequacy of his representation and the resulting prejudice to him.

Facts Material to a Consideration of the Questions Presented Herein.

Your petitioner was charged by the District Attorney of Los Angeles County with a violation of Section 209, Penal Code (kidnaping for the purpose of robbery) in five counts; the crime of robbery, Section 211, Penal Code, in three counts; rape, Section 261.3, Penal Code, six counts; violation of Section 288a, Penal Code, in six counts; and violation of Section 207, Penal Code (kidnapping), two counts. The Information is to be found in the Clerk's Transcript, pages 1-22, Folder 1, Record on Appeal, in Case No. 328, October Term, 1958, to which we respectfully direct the Court's attention, for we no longer have a copy of the Record in that case or the trial itself, for the reason that it was filed with this Court in support of our petition for certiorari to review the judgment of the Supreme Court of the State of California in affirming the conviction, which case bears this Court's No. 328, October Term, 1958.

To the Information the defendant entered a plea of not guilty and not guilty by reason of insanity. At the commencement of the trial the petitioner withdrew his plea of not guilty by reason of insanity and the matter proceeded to trial before a jury [Clk. Tr. Superior Court, L. A. County, Calif., Folder 1, Record on Appeal, pp. 25 and 45, Case No. 328, Wein v. California, October Term, 1958, of the Supreme Court of the United States].

Thereafter the defendant, your petitioner, was found guilty and five death sentences were pronounced, as well as other judgments for long periods of confinement.

An automatic appeal was taken to the California Supreme Court under Section 1239, subdivision b, Penal Code of California, *but no appeal was taken by trial counsel from any of the other judgments, some involving life imprisonment.*

Manner Federal Questions Were Raised and Rulings Thereon.

All of the Federal questions presented by this petition were raised before the Supreme Court of the State of California by way of the petition for habeas corpus, or, in the alternative, error *coram nobis*, this being the court before which they should be raised. Section 1265 of the Penal Code of California provides in part:

> "* * * provided, however, that if a judgment has been affirmed on appeal no motion shall be made or proceeding in the nature of a petition for a writ of error *coram nobis* shall be brought to procure the vacation of said judgment, except in the court which affirmed the judgment on appeal. When a judgment is affirmed by a district court of appeal and a hearing is not granted by the Supreme Court, the application for the writ shall be made to the district court of appeal. Leg. H. 1872, 1949, ch. 1309."

This case having been affirmed by the Supreme Court of California, it was therefore mandatory that relief be sought before the Supreme Court by reason of the section just hereinbefore quoted.

PRELIMINARY STATEMENT.

We respectfully direct the Court's attention to the fact that heretofore this matter has been before this Court upon a petition for certiorari to the Supreme Court of the State of California entitled "Wein v. California, Case No. 328, Supreme Court of the United States, October Term, 1958". Petition for certiorari was denied.

Subsequently another petition for certiorari was filed before this Court bearing No. 679, October Term, 1958, which petition sought to review an order denying a petition for habeas corpus or, in the alternative, error *coram nobis*.

This petition refers to a second petition for writ of habeas corpus or, in the alternative, for a writ of error *coram nobis*, which bore No. 6413 before the Supreme Court of the State of California, and which petition fully recited facts which had not been theretofore called to the attention of the Supreme Court of California concerning the employment of counsel and the inadequacy of the representation at the trial by trial counsel. By this petition for a writ of certiorari we seek to obtain a hearing upon the issue of the inadequacy of counsel, at which time evidence could be produced to show the circumstances of the employment of counsel and the inadequacy of representation of the defendant by trial counsel, as more fully hereinafter set forth, and we particularly direct the Court's attention to the case of *Lunce v. Dowd*, 261 F. 2d 351, decided as late as December 3, 1958, which affirms a decision of the District Court granting a petition for a writ of habeas corpus, and discharging two prisoners from

the custody of the Warden of the Indiana State Prison following a hearing pursuant to the remand of the Circuit Court in *Lunce v. Overlade*, 244 F. 2d 108, based upon the inadequacy of counsel.

This case involves the infliction of the death penalty upon a man charged and convicted of offenses compounded from charges of kidnaping for rape where none of the alleged victims were moved more than from one room to another in their own homes; where none of the alleged victims suffered death or real severe personal injuries other than sexual contact.

This is one of the cases where the fixing of the penalty was left to the jury, and but for the gross misconduct of the prosecution and the unfairness of the conduct of the trial, it is inconceivable that the death penalty would have been inflicted.

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

I.

The Representation of the Defendant by His Trial Counsel Was Constitutionally Inadequate and Did Not Meet the Exacting Standard of Representation Under the Fourteenth Amendment to the United States Constitution. The Defendant Was Denied Adequate Representation of Counsel.

The petitioner has been denied the right of a hearing at which time and place to offer evidence to show the inadequacy of his representation by trial counsel; the facts surrounding the withdrawal of the plea of not guilty by reason of insanity which demonstrate that he was not advised of the effect of his waiver, and at such hearing if one be granted, the petitioner should be entitled to show all of the facts and circumstances surrounding his representation and the inadequacy thereof. To this time he has been denied a hearing at which to offer evidence to show the gross inadequacy of his representation and the resulting prejudice to him.

Your petitioner is asking that he be given a hearing, at which hearing he would show that the attorneys who were employed to defend petitioner at the trial did not appear and conduct the trial, but had a younger man in the office conduct the trial over the protest of your petitioner and his father. These matters were not raised on the motion for new trial and did not appear in the record of the trial, for obvious reasons. It could hardly be expected that the petitioner or his parents could have raised these objections, for they were under the restraint and influence of the then trial lawyer. The lawyer who ac-

tually conducted the trial and made the motion for new trial is a member of the office staff of the lawyer who was employed to conduct the trial, and the only manner in which this defendant-petitioner can bring all of these facts to the attention of the Court is for this Court to direct that a hearing be held at which to show these facts and to demonstrate how he was thereby prejudiced.

We respectfully urge that the prisoner is entitled under due process to a hearing upon the issue of the inadequacy of counsel (*Lunce v. Overlade*, 244 F. 2d 108; *Lunce v. Doyd*, 261 F. 2d 351; *Smith v. United States*, 259 F. 2d 125), in order that he may offer evidence to show that his rights were not properly protected; in order that he may offer evidence to show that constitutional guarantees were not explained to him; that he waived substantial rights without any information as to the effect of such waiver. We respectfully urge that the prisoner is entitled to a hearing upon this subject in order that he may offer evidence as to the inadequacy of his representation.

Facts Concerning Employment of Trial Counsel.[1]

That at the time Edward Simon Wein was arrested for this offense, it came to the attention of the family of this petitioner, David Wein, the father of the said Edward Simon Wein, and, after consultation within the family and with business associates, it was determined that the family would employ the best lawyer available in the community for the defense of the son, Edward Simon Wein. Thereafter, David Wein and the family consulted with a lawyer who bears the reputation of be-

[1]The facts are set forth in the Record pp. 4-9, inc.

ing one of the most skilled trial lawyers in California, if not in the United States, and whose ability is unquestioned. He has participated in some of the most famous and complicated crime cases ever tried within the State of California, and commands the respect of both the bench and bar, and his reputation is both merited and justified. We will hereafter refer to such lawyer as "Lawyer 'A'."[2]

David Wein, father of the said Edward Simon Wein, thereupon, with members of his family, went to the office of Lawyer "A" and sought to employ him to represent the son, Edward Simon Wein. They were referred to Lawyer "B"; a consultation was held with Lawyer "B" who, after some discussion, stated in substance or effect, "I will discuss this matter with Lawyer 'A' and will advise you."

Within a day or two, David Wein, father of the condemned man, had another conference with Lawyer "B," who then stated that he had discussed the matter with Lawyer "A," and that they would accept the defense of Edward Simon Wein, but that at the arraignment Lawyer "C" would appear, but that Lawyers "A," "B" and "C" would work together; would take charge of the case;

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[2]No good purpose could be served in here identifying the lawyer by name, nor his associates, although at least one of them is well identified by reason of the record, but our duty as lawyers charged with the responsibility of representing this man in a capital case, requires us to bring these matters to the attention of the Court.

Lawyer "A" has an associate, an able and skilled lawyer, with a great deal of experience in trial work, including criminal, and we will refer to him as "Lawyer 'B'."

The lawyer who actually tried the case was a young man, with some experience, but lacking in both the background, experience and age of Lawyers "A" and "B," and in no manner comparable to them as a trial lawyer, whom we will designate as Lawyer "C."

would plan it; and that Lawyer "B" would conduct the trial.

Thereafter a further meeting was held; and it was agreed that Lawyer "A" would accept the case upon the payment of the sum of $45,000.00, to be paid in installments. Thereafter, such sum, namely, $45,000.00[3] was paid by numerous checks signed by David Wein, who signs this petition. All of the checks were made payable to Lawyer "A," and were cashed by him and paid by David Wein's bank.

The case then progressed by way of investigation, and an investigator was employed who was paid for by David Wein. Thereafter, the preliminary examination came on to be heard, and this was conducted by Lawyer "C."

Thereafter, the trial date approached, and shortly before the trial, at a date which cannot now be exactly fixed, but David Wein believes it to be about two weeks before the trial date, or possibly ten days, he was called to the office of Lawyer "A," and there he met Lawyer "B," who stated in substance to David Wein, "it would be best to have a younger man, Lawyer 'C,' actually try the case, but that he, Lawyer 'B,' would be present in court and would actually be in charge of the trial."

David Wein thereupon protested, and stated that Lawyer "A" had been hired; they had paid $45,000.00 to Lawyer "A"; they understood that at all times at least

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[3] The actual checks showing to whom they were made payable; showing the endorsement and payment, and totaling $45,000.00, are in the possession of David Wein; photostatic copies are in the possession of counsel for the petitioner, and upon request by this Court, the originals, or photostatic copies, will be immediately made available to this Court.

Lawyer "B" would be actually in court and in charge of the case.

David Wein thereupon stated to Lawyer "B" that his son, Edward Simon Wein, did not want Lawyer "C" to represent him; that he had only been visited in the jail four or five times by Lawyer "C" and that he did not believe that Lawyer "C" was ready and able to conduct his defense, and he did not want him to represent him in court.

Thereupon Lawyer "B" engaged in further discussions with David Wein and assured him that he, Lawyer "B," would be present at all times throughout the trial, and, after discussion, Lawyer "B" produced a written document, the exact words of which are not known to David Wein, for no copy thereof was given to him, but, as David Wein remembers it, it amounted to a consent on the part of David Wein to permit Lawyer "C" to actually try the case. David Wein, not knowing what else to do, signed this document.

Time prior to trial was then so short that David Wein had neither time nor the ready cash with which to employ other counsel.

A few days before the actual commencement of the trial, David Wein was again sent for by Lawyer "B," and advised by Lawyer "B" that he, Lawyer "B," had to be out of the State and would not be present at the trial, but that it had all been planned and the defense was ready.

David Wein then vehemently protested, and asserted that under no circumstances did Edward Simon Wein want to proceed to trial with Lawyer "C"; that he was

not the lawyer of his choice, and he did not want him. David Wein had neither the money nor time with which to employ other counsel. The trial was imminent.

The trial therefore commenced and proceeded to a conclusion in charge of Lawyer "C," and Lawyer "B" failed to appear and be present at all times at the trial as he had agreed to do.

INADEQUACY OF REPRESENTATION BY TRIAL COUNSEL.

1. Defendant, your petitioner, stands convicted of offenses for which he can be punished in prison for 50 years or a life term. From these judgments involving such penalties trial counsel failed to take an appeal, apparently relying upon the provision calling for an automatic appeal to the Supreme Court of California in the death penalty cases, so that no matter what happens to the death penalty cases, if they should ever be reversed, the defendant, your petitioner, still stands convicted with judgments to run consecutively, upon which he could do either 50 years or life imprisonment.

In *Lunce v. Doyd*, 261 F. 2d 351, the prisoners were freed by the court because of the incompetency of counsel in neglecting to file a notice of appeal. Counsel was an Ohio lawyer, with a lack of comprehension of the Indiana system of procedure in criminal matters. *Lunce v. Doyd* pales into insignificance when you compare the inadequacy of representation in that case to that of the instant case.

2. We respectfully urge that the petitioner is entitled under due process to a hearing upon the issue of the inadequacy of counsel in order that he may offer evidence to show that his rights were not properly protected; in

order that he may offer evidence to show that constitutional guarantees were not explained to him; that he waived substantial rights without any substantial information as to the effect of such waiver. There is nothing in the record to show that appellant was ever advised of the nature of the defense he could interpose under the plea of not guilty by reason of insanity, which was withdrawn by his counsel without the defendant ever having been advised of the gravity of such a step, nor the rights which he was then and there giving up. There is nothing to show, and he was not advised that he was not bound by the reports of the psychiatrists regardless of what they may have said concerning his sanity; nor was he advised that he had a right to cross-examine the prosecutor's alienists and to call his own alienists to controvert the reports of the prosecutor's alienists; nor was he ever advised that the reports of the alienists were not binding upon him; nor was he advised that the issue of his sanity under his plea of not guilty by reason of insanity presented a jury question and that a jury was not bound by the opinions and the conclusions of the alienists. He withdrew the right of a trial by jury on this all-important issue without ever having been advised by his trial counsel of the consequences thereof. The withdrawal of the plea of not guilty by reason of insanity was not free or voluntary and was not done with full advice antecedent thereto, and it constituted a denial of due process of law.

His trial counsel either knew, or should have known, that there was valid substantial evidence to be offered in behalf of the defendant Edward Simon Wein and in support of his plea of not guilty by reason of insanity as follows: [See Record, pp. 9-11, inc.]

(a) He had departed from a course of conduct which had been normal. He had conducted a substantial business, had pursued a normal family life, and was a conservative, hard working, substantial individual with a substantial business and earning capacity. From that course of conduct he became involved in domestic difficulties; he started gambling; he changed his entire course of conduct. Upon one occasion he attempted suicide.

(b) He was confined in the psychopathic ward of the Los Angeles County General Hospital for observation. For more than six months he consulted a psychiatrist and took regular treatments concerning a mental disorder.

(c) That there is available, and was, the opinion of a competent psychiatrist that, in his opinion, Weiss was mentally ill to the extent of actual psychopathy.

(d) There was available substantial evidence of lay persons who knew the said Edward Simon Weiss and who could have testified concerning the change in his personality and the change in his course of conduct, all of which evidence, in its entirety, could have been, and should have been, submitted to a jury, and it might well have resulted in a verdict from the jury which would have saved this man's life.

MISCONDUCT OF DISTRICT ATTORNEY TO WHICH NO OBJECTION WAS MADE BY TRIAL COUNSEL.

That trial counsel permitted, without objection, a course of misconduct to be pursued by the District Attorney prosecuting the case, without which said course of conduct, a lesser penalty than death might well have been expected from the jury. [See Record, pp. 11-26.]

Some of the evidence of the misconduct of the district attorney has been set forth by us in the appendix attached

hereto and marked Appendix "A", and the references therein are to the record on file in support of our petition for certiorari in the case of Wein v. California, Case No. 328, Supreme Court of the United States, October Term, 1958.

We have pointed out the foregoing remarks by the prosecuting attorney because they were indicative of two things: first, the viciousness of the remarks by the prosecutor which pointed up the unfairness of the trial and also demonstrated the inadequacy of petitioner's defense, for with one exception no objections were made to this continuous line of inquiry, which was most improper.[4]

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[4]The failure to object was utilized by the Majority Opinion of the Supreme Court of California in affirming this conviction, 58 A. C. 316, 50 Cal. 2d 383, 326 P. 2d 457 at 463, where the court said:

> "In effect, he (referring to the prosecutor) did little more than to state general theories underlying criminal prosecutions. *In any event, since defendant failed to object to any of the alleged improper conduct during the deputy district attorney's examination of the veniremen*, he cannot now complain for the first time as, upon objection, any danger that the jury might have misunderstood their duty could have been *corrected by proper instructions.*"

Next (Majority Opinion, 326 P. 2d 457, at 464), we find the Court saying:

> "In any event, *no objection was made* in the trial court to any of the above conduct or to certain other matters of which defendant now complains, and *no instructions were asked with respect thereto.*"

Next, we find the Court, in effect, concluded that the prosecutor went beyond *the bounds of propriety* (Majority Opinion, 326 P. 2d at 464), where it stated:

> "There was one instance during the prosecutor's argument, however, where he may *have strayed beyond* the bounds of permissible argument and where a prompt objection was made by defendant's counsel."

Next, we find the Majority Opinion, 326 P. 2d at 467, in commenting on an accusatory statement, saying:

> "the second one, where defendant remained silent, on the asserted ground that he would not speak unless he had an attor-

This is "a case where the misconduct of the prosecuting attorney was not slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." (*Berger v. United States*, 295 U. S. 78, 88.)

Trial counsel for the petitioner should have objected but utterly failed to recognize the viciousness of this conduct.

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ney present, might *well have been excluded* if *objection had been made* (See *People v. Abbott*, 47 Cal. 2d 362, 373; *People v. McGee*, 31 Cal. 2d 229, 238-240.) However, defendant's objection to this line of testimony is made for the first time *on this appeal.*"

Next, the Court says, in effect, that *no objection* having been made, it was *not necessary to give an instruction.* As the Court said (326 P. 2d 457 at 467):

> "Moreover, the giving of instructions on the definition of an admission, the effect of silence or a false or evasive reply, and the possibility of falsehoods indicating consciousness of guilt (see Cal. Jury Instrns., Crim. (1946 and supp. 1953) Nos. 29, 29-D, 30, 30-A), was not error since the evidence introduced *without objection* could be considered by the jury."

Then the Court goes on to say, *"there were other incidents in the record, admitted without objection, which fell within these instructions."* (Majority Opinion, 326 P. 2d 457 at 467; emphasis supplied.)

Thus it will be seen that the Supreme Court of California in its Majority Opinion recognized that the deputy district attorney did several things which he might well not have done, to put it mildly:

(1) He referred to the jurors by name;

(2) he continuously urged the death penalty;

(3) he compared the defendant to Chessman and referred to the very acts in the Chessman case;

(4) he used epithets, such as "strange breed," "kidnapers," "robbers" and "forcible rapists."

No objection was made to this course of conduct by the district attorney prosecuting the case by trial counsel, except upon one occasion. We contend now that this defendant, your petitioner, is entitled to a hearing so that he may show that these things occurred, and what effect it had concerning the question of proper representation.

We contend that the withdrawal of the plea of not guilty by reason of insanity as hereinbefore set forth without advising your petitioner of his rights was a grave misstep upon the part of trial counsel. [See Record Folder I. Rep. Vol. I pp. 3-6, Wein v. California, No. 328, Oct. Term, 1958. We must of necessity refer to this Record as we do not have it.] As the record reflects and as a hearing upon this matter will demonstrate, this petitioner did not waive his right, but on the spur of the moment his counsel withdrew the plea at the inception of the trial, and as was said in 7 Corpus Juris Secundum: Attorney and Client, Section 100c, page 922:

> "Whether a waiver has occurred depends upon the circumstances of each case. A waiver involves the intentional relinquishment or abandonment of a known right or privilege. A strong presumption is raised against the waiver of fundamental rights by an accused. His constitutional rights are jealously and vigilantly guarded. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461; Glasser v. United States, 315 U. S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680; Von Moltke v. Gillies, 332 U. S. 708, 723, 68 S. Ct. 316, 92 L. Ed. 309; McCrea v. Jackson, 6 Cir., 148 F. 2d 193, 197. The mere silence of an accused or his failure to object or to protest a discharge of the jury cannot amount to a waiver of this immunity. 'It would be a harsh rule to hold that defendant consented to a withdrawal of the case from the jury simply because he interposed no objection.' State v. Richardson, 47 S. C. 166, 25 S. E. 220, 222, 35 L. R. A. 238. There must be more in order to overcome the presumption."

The foregoing was quoted with approval in *Himmelfarb v. United States*, 175 F. 2d 924, 931, where the Court said:

> "And it is plain that no stipulation of counsel waiving his client's constitutional right could be effective without the client's specific assent. In absence of express authority, an attorney has no power to surrender substantial legal rights to his client. * * * To hold that Ormont, or indeed, Himmelfarb, acquiesced in the discharge of the jury is 'to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused.' Glasser v. United States, 315 U. S. 60, 72, 62 S. Ct. 457, 465, 86 L. Ed. 680."

It is our contention that the petitioner is entitled to a hearing upon this issue where it can be clearly demonstrated that he did not know what he was doing when this plea was withdrawn and he thereby waived the right of a trial by jury on that all-important issue which might well have saved his life.

Authority for Hearing on These Issues.

We respectfully contend that this Court has the power and the authority to direct that a hearing be held upon these issues in order that testimony be taken thereon, so that a court may intelligently pass upon the inadequacy of representation and other matters set forth herein.

Recently in *Smith v. United States*, 259 F. 2d 125, recently decided by the United States Court of Appeals, Ninth Circuit, it was held that the petitioner was entitled to a hearing upon the issue of the inadequacy of counsel and the issue of his insanity at the time of trial.

the very thing we are contending for here, and that court ordered a hearing.

The Supreme Court of California should have ordered a hearing upon this matter and erred in failing to do so.

As to the Subject of the Inadequacy of Representation.

See *Lunce v. Overlade*, 244 F. 2d 108, a habeas corpus proceeding, where the writ was granted upon the ground that the defendant was not competently represented by his own counsel.

See *Lunce v. Dowd*, 261 F. 2d 351.

See also *Moore v. State*, 78 S. Ct. 191 at 194, where the Court said:

> "The record shows possible defenses which might reasonably have been asserted at trial, but the extent of their availability raised questions of considerable technical difficulty obviously beyond his capacity to comprehend. For instance, one possible defense was insanity, suggested by the trial judge's statements that, 'his one desire is to have it all over, to get to the institution to which he is to be committed, and to be under observation and to be examined . . . .; he insists that there is something wrong with his head; that he has had something akin to queer sensations before this.' Another possible defense was mistaken identity, suggested by the fact that the evidence pointing to him as the perpetrator of the crime was entirely circumstantial. (Cases cited.) Moreover, the proceedings to determine the degree of murder, *the outcome of which determined the extent of punishment, introduced their own complexities.* With the aid of counsel, the petitioner, who, as we have said, neither testified himself in the proceeding nor cross-examined the prosecution's wit-

nesses, *might have done much to establish a lesser degree of the substantive crime, or to establish facts and make arguments which would have mitigated the sentence.* The right to counsel is not a right confined to representation during the trial on the merits. *Reece v. State of Georgia*, 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77. The circumstances compel the conclusion that the petitioner's rights could not have been fairly protected without the assistance of counsel to help him with his defense." (Emphasis supplied.)

"The right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Glasser v. United States, 315 U. S. 60, 76, 86 L. Ed. 680.

See also:

Coplon v. United States, 191 F. 2d 749, 759.

3. TRIAL COUNSEL UTTERLY NEGLECTED AT ANY PLACE IN THE TRIAL TO CALL ATTENTION TO THE FACT THAT THE DEFENDANT, YOUR PETITIONER, WAS DETAINED AND HELD BY THE POLICE FOR FIVE DAYS WITHOUT BEING TAKEN BEFORE A COMMITTING MAGISTRATE, DURING WHICH TIME HE WAS EXHIBITED TO PUBLIC VIEW BY WAY OF TELEVISION, NEWSPAPERS, SHOW-UPS; CONFRONTED BY WITNESSES; ACCUSATORY STATEMENTS WERE MADE TO HIM BY WITNESSES AND HIS REPLIES USED AGAINST HIM; IDENTIFICATION WAS MADE BY REASON OF THE CONDUCT OF THE OFFICERS DURING THE PERIOD BETWEEN ARREST AND ARRAIGNMENT. IT AMOUNTED TO A DENIAL OF DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(a) From the time of your petitioner's arrest to the time of his arraignment five days elapsed, during which he was first taken to the Long Beach City Jail.[5]

(b) Next, the deputy sheriff who was with your petitioner at the time of his arrest stated, "You had better confess, Eddie, or they will make it go hard on you."

Shortly after being placed in the Long Beach Jail, two Los Angeles detectives arrived, they placed handcuffs on your petitioner, put him in a car, and the handcuffs were not removed for nine hours. Your petitioner and Crawford were driven to where Crawford's car was parked; Crawford then got into his car and followed the officers and petitioner. The detectives then searched, without benefit of search warrant, petitioner's truck. They took many papers from the truck, which your petitioner was never permitted to see again. The officers then drove your petitioner to within two blocks of Crawford's home and parked; then Crawford drove away, leaving petitioner and the officers. In about fifteen minutes Crawford returned and handed over to the detectives petitioner's personal belongings which had been at Crawford's house, your petitioner having been staying there temporarily with Crawford. The officers then drove petitioner to the Hollywood Police Station. Petitioner was taken upstairs, placed in a chair, and sat there until noon of that day. Many people passed through the room; petitioner is informed it was the complaint room. In the afternoon petitioner was interrogated by the officers, and petitioner was told by the detectives that if "you do not

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[5] Please see Record Folder III, Motion to Augment Record, (Wein v. California, No. 328, October Term.)

confess you will get the same prosecutor that Chessman had and they will make another Chessman out of you." Later the officers said, "You will die long before Chessman dies." Petitioner was told that if he would confess, "not much will happen to you." Some time later Crawford returned and suggested that petitioner plead guilty. Crawford then left. The police returned and continued to question your petitioner as to his whereabouts on various days. Your petitioner replied he could not answer for certain without access to his business records and his diary which would indicate to petitioner where he was on days past. Petitioner told the detectives where they could get his business records and diary. The detectives replied it would be of no use to see these things because "we know you are the guilty party." Continuously for four days when petitioner was questioned he asked for permission to see his records and diary. They were never given to him. After four days of questioning and examination and exhibition, your petitioner was taken to a cafe on Sunset Boulevard, Los Angeles, then was returned to the station and booked and fingerprinted. Petitioner then was taken downtown to the jail and a jail photograph or "mug" taken of your petitioner. Petitioner was then taken down to the basement where there was a newspaper reporter and a photographer waiting. The police made your petitioner take his glasses off; photographs were then taken of your petitioner with his glasses off. Petitioner was then told by the detectives, you are a rapist; then the reporters said, you are a rapist. The next day your petitioner was told to comb his hair, and then he was taken to a home in the Hollywood Hills. Before petitioner left the police station a number of newspaper reporters and photographers gathered around

your petitioner in the police station and his pictures were taken. In front of the reporters and photographers your petitioner was called numerous vile names by the detectives.

After being taken to the home in the Hollywood Hills, Mrs. Manning, who claims to have identified your petitioner, and another witness who later testified as to the license of a car allegedly driven by your petitioner, were present, and the police permitted Mrs. Manning to question your petitioner.

(c) Next the detectives drove your petitioner to North Hollywood; Mr. Crawford followed in his car. Your petitioner was taken to the home of another witness, the boy who testified concerning an automobile, and this boy looked at Crawford's car.

(d) Thereafter your petitioner was put through many lineups, and in each instance the people viewing your petitioner were permitted to see him before he was even put in the actual lineup. Your petitioner was required to walk to the lineup room and pass through a corridor that faced the room where the viewers were. The door into the corridor was always open, and your petitioner could see many people in the room who were the viewers, and they could see your petitioner. After one of the lineups Mrs. Bothman, a witness, was present, and she confronted your petitioner, with the permission of the police, in the corridor, and your petitioner was asked by her, "Are you the man who came to my house?" Your petitioner replied he was not. Thereupon the police became very angry and shouted at your petitioner and said, "You cannot talk to any witnesses" and immediately put

your petitioner in a cell. At another lineup or showup, the police permitted a witness to question your petitioner. Your petitioner then replied, "If I can have my lawyer present I will talk to the witness."

(e) About the third day your petitioner was directed to clean up, and he was then taken to the office of the District Attorney of Los Angeles County in the Hall of Justice. At that time your petitioner said to the police, "I do not want to go to the District Attorney's office without my lawyer. I do not want to talk to anyone without my lawyer being present." Your petitioner was taken against his consent and will to the office of the District Attorney. He was led into a room that was filled with newspaper reporters, cameras, TV cameras, and even sound tracks upon which TV talk is recorded. Your petitioner then said, "I do not want to talk. I want my lawyer present or I will not speak. I am entitled to have my lawyer." The District Attorney himself then entered the room and commenced talking to your petitioner. The police then came over to your petitioner and made him give the police his glasses. Then additional pictures were taken by the newspaper photographers and the TV photographers of your petitioner. Again the District Attorney started to talk to your petitioner and again your petitioner replied, "I do not want to talk unless my lawyer is called." The District Attorney kept talking to your petitioner, asking questions. While this was going on, the photographers would interrupt and urge your petitioner to take different poses and the police made your affiant do so, against his wishes and will.

(f) Throughout the questioning which lasted almost five days, the detectives continued to tell your petitioner that if your petitioner did not "hurry up and confess, they would keep putting his picture in the paper and charge him with more offenses, including murder."

(g) On the fourth day after your petitioner was taken into custody, he was taken to the Hall of Justice, but nothing was done. Your petitioner was not taken to a committing magistrate; notwithstanding there are at least eight or nine branches of the Municipal Court of Los Angeles City and County in the Hall of Justice, and there is a judge on duty at nearly all times; in fact, the district attorney's office to which your petitioner was taken is only one floor below the floor occupied by a number of municipal court judges, including the judge who commonly and has for years arraigned prisoners charged with felonies. At neither time of the visits to the Hall of Justice, including that to the district attorney's office, was your petitioner taken before a committing magistrate and informed of the charges against him.

(h) During the five days from the time your petitioner was arrested until he was finally arraigned in the Mu icipal Court, your petitioner continuously asked to see his attorney and at no time consented to being interviewed by reporters; at no time did your petitioner consent to his photographs being taken; at no time did your petitioner consent to the taking of photographs for television or interviews for television; nor did your petitioner consent to being interviewed by various persons.

(i) That this matter was not raised by trial counsel at the time of trial, but a motion was made by petitioner before the Supreme Court of California to augment the

record so that there would be before the said Supreme Court the Minutes of the Municipal Court which would establish that the prisoner was not arraigned until five days had elapsed after his arrest. The Supreme Court denied the right to augment the record because this was not before the trial court. Your petitioner is entitled to a hearing upon this issue so that he may show all of these facts and to demonstrate that the prosecution built a considerable portion of its case through the matters and things which they learned during the period between arrest and arraignment, during which time victims were permitted to view the defendant; accusatory statements were made and used against him in court. His picture was put in the newspapers, on television, and the case discussed on the radio. The prisoner was taken to the Hall of Justice to the office of the District Attorney where he was photographed, interviewed and televised without his consent, but he was not taken to a committing magistrate, but one floor of steps away.

Such failure to promptly arraign the defendant was in violation of the Penal Code of California, Section 849,* and was denounced by this Court in *Mallory v. United States*, 354 U. S. 449, 455, 1 L. Ed. 1479.

See:

Shepherd v. Florida, 341 U. S. 50, 95 L. Ed. 740.

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*California Penal Code Section 849 provides as follows:

"*Person arrested without a warrant to be taken before a magistrate. Information to be filed.* When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint, stating the charge against the person, must be laid before such magistrate."

Conclusion.

By this petition we respectfully urge, as sincerely as we can, that the Court order a hearing. This man will go to his death without ever having had a hearing upon the all-important question of the adequacy of counsel, and where there is left undetermined the question of his then sanity; and we respectfully urge that the learned Supreme Court of California was in error when it denied our petition for a writ of habeas corpus or, in the alternative, error *coram nobis*, by which proceedings we seek a hearing, and we have urged—and now urge that if habeas corpus is not the appropriate remedy, then error *coram nobis* would lie.

See *United States v. Mayer*, 235 U. S. 55, 67, cited with approval in *United States v. Morgan*, 346 U. S. 508, 98 L. Ed. 248, 255, 257, where the court said, quoting *Mayer*, supra, "that coram nobis included errors of the most fundamental character."[7]

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be granted to the Supreme Court of the State of California, to the end that a full hearing may

[7] In *United States v. Morgan*, cited above, 346 U. S. 512, 98 L. Ed. 257, the Court said this:

> "Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of coram nobis must be heard by the federal trial court. Otherwise a wrong may stand uncorrected which the available remedy would right."

We assert that this is full authority for the Supreme Court of California to have granted a hearing, and it was a denial of due process so to do. There is ample authority for this Court to grant this petition, to the end that a hearing may be had and justice be done.

be had herein, and to the end that this petitioner, in the alternative, may be discharged, and for such other and further relief as to the Court under the law and the facts set forth herein may seem meet and just, whether it be by way of certiorari, habeas corpus, or error *coram nobis*.

Respectfully submitted,

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APPENDIX "A".

1. "Now, that is this very situation here. In other words, so that we may be clear, there is no charge against this defendant of having killed or murdered anyone. He is charged with five possible capital offenses, which is kidnapping for the purpose of robbery, wherein if you find the victims did suffer bodily harm, then you as jurors in your sound and absolute discretion will be faced with the duty of determining whether, all things considered, all the evidence in the case, whether the greater penalty of death is the proper penalty in the case or whether life imprisonment without the possibility of parole is what the punishment should be." [R. Folder I, R., T. Col. I, p. 116.] These are References to the Record *Wein v. California*, October Term No. 328. We must refer to the Record thus as we do not have a copy of the Record.

2. Further, in questioning the jury on *voir dire*, the prosecutor said:

> "I assume you will all follow that instruction of the Court if the Court gives it to you: Now when you get to the question of penalty will you be willing to take into consideration in determining from all the evidence in the case, within your sound and absolute discretion, as to whether the penalty should be the death penalty as against life imprisonment; that if you should impose life imprisonment without the possibility of parole that doesn't mean necessarily the defendant would have to serve the remainder of his life in prison without parole because there is always the possibility of a pardon from the Governor, a commutation of his sentence to time served, and a possibility of a change in the parole laws. In other words, maybe five, ten, fifteen

years from now, when I am gone or at least as has been among prosecutors, when you give him life without possibility of parole, some new administration might occur in our penal system and he might either seek from the Governor a pardon, if you gave life without parole there may be a change in the parole laws by the legislature or the Governor might commute it. Now, would you be willing to consider those things if you are convinced of the defendant's guilt on any one or more of the five counts of kidnapping for the purpose of robbery? Will you consider those possibilities that he would again be free under any one of those three possibilities if you gave him life imprisonment without the possibility of parole as compared to the death penalty? Would you all be willing to do that? [R. Folder I, R. T. Vol. I, pp. 119-120.]

ARGUMENT TO THE JURY.

3. The prosecutor at the inception of his argument stated:

"Mr. Leavy: So, at any time during the argument here I want you to understand that whenever I state that in my opinion thus and so, the evidence shows this or that, I want you to understand it is my opinion as the Deputy District Attorney in this case wherein I appear here on behalf of the District Attorney as one of his deputies." [R. Folder II, R. T. Vol. VII, p. 1169.]

Further, in the argument, the prosecutor said:

"Mr. Leavy: I have charged certain crimes; I could have charged others, such as, in all of these cases where the defendant used a knife, the manner in which he used it would constitute an assault with a deadly weapon upon those persons, even Mrs.

Casady wherein there is only one charge of simple kidnapping, but I have not charged those things because to me it would just encumber your duties here, the record and everything else." [R. Folder II, R. T. Vol. VII, p. 1170.]

The prosecutor later said:

"Mr. Leavy: . . . as I have told you, I could have charged other offenses because every time this man went into a house with the intent and purpose to commit any one of those felonies with which he is here charged he committed the offense of first degree burglary, although to me that is extraneous here." [R. Folder II, R. T. Vol. VII, p. 1177.]

Further, the prosecutor said:

"Mr. Leavy: You folks sat here on voire dire and you listened to me. I could not give your the evidence; we were not allowed." [R. T. p. 1178.]

"I knew what the evidence would be with the exception of one matter which I will argue later which I learned a week ago . . ." [R. Folder II, R. T. Vol. VII, p. 1178.]

4. Later, the prosecutor said:

"Mr. Leavy: . . . I have done many times in these courts, I could lay the foundation to show he was lying and not just with Mrs. Tierstein's identification, and she is not even certain, as the other witnesses are, that it is he, but with that handwriting, that fatal mistake he made on the day he came back hoping to strike and mistreat Mrs. Tierstein as he has mistreated these other women, hoping to strike, but through his intuition for some reason he did not strike, and fortunately for him, but unfortunately for the administration of justice, he did not because if he had Mr. Tierstein, Dr. Tierstein

would have been home and Wein would have been a coroner's case and perhaps we would not have to be here." [R. Folder II, R. T. Vol. VII, pp. 1179-1180; emphasis ours.]

The prosecutor further said:

"So each and every one of those counts is established beyond any doubt under those facts, and although some of you may have not believed that Mrs. Manning's identification was correct, keep in mind, forgetting the identity of the defendant, when Mrs. Manning testifies to those facts she establishes under the law what we call the corpus delicti of each of those four crimes charged wherein she is involved. The corpus delicti, the conception of that in the pulp's is—I think it means the body in a homicide case, but it does not, folks. It is nice copy and makes good reading. They say 'They haven't got the corpus delicti,' they have to discover the body like in the L. Ewing Scott case. A lot of people think the body of Mrs. L. Ewing Scott is the corpus delicti. Well, it is not the corpus delicti. The corpus delicti of murder in any crimes means under the law proof of the essential elements constituting the offense, such as kidnapping means movement against the will and without the consent, regardless of the distance." [R. Folder II, R. T. Vol. VII, pp. 1185-1186.]

Next the prosecutor said:

"Mr. Leavy: It proves he is the man that did it because he sits here with ice water in his veins, ice water, when I brought Mrs. Tierstein up to him; and that is the behavior pattern of a man, the strange breed, as I have told you, of kidnappers, robbers and forcible rapists. They are cold, they are cruel."

"Why, this fellow puts Caryl Chessman to shame. He makes a rank amateur out of Caryl Chessman. Caryl Chessman got out of the penitentiary in 1947 after having been paroled for the second time. He was paroled a year or so before, but he was paroled in December of '47; at some short time before, he, having stolen a car, escaped from prison and committed a number of robberies." [R. Folder II, R. T. Vol. VII, p. 1329; emphasis ours.]

"Mr. Leavy: Chessman was an easy man to catch compared to this fellow. Chessman was paroled in December of '47. He stole a car January 3rd of '48, and by means of red cellophane paper made it look like a red spotlight, came up to lovers lane couples that might be spooning. Thinking he was a detective, before they knew it they found themselves in the hands of Chessman.

"But the police had a chance to catch the man because he was working on the streets with a car, and by January 23rd the Hollywood Division again —those men are gone; these fellows were not there then; those men are gone—two rookies officers in a chase 80 miles an hour down Vermont Avenue in a running gun fight captured Chessman; they had half a chance.

"Here is a fellow answering ads, something the police have difficulty detecting. They have to wait until he strikes; they cannot look for a car of a certain description on the streets.

"Chessman, too, had ice water in his veins." [R. Folder II, R. T. Vol. VII, pp. 1329-1330.]

6. Continuing, the prosecutor said:

"That little girl, Karen Louise Stokes—yes, he is right—she will carry a mark on her forever. *She may end up the same way Mary Alice Meza, the 17-*

year-old virgin the victim of the Chessman attack, in a mental institution unless she has a strong mind and can in some way through her religious thinking beat it." [R. Folder II, R. T. Vol. VII, pp. 1330-1331; emphasis ours.]

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"And I know from experience that this business of life imprisonment for murder, of life imprisonment without the possibility of parole, that is what the statute says, but that is not what it means: *One man was convicted of an offense of one of the very same offenses Caryl Chessman committed, Knowles. He was convicted by a judge who gave him life imprisonment without possibility of parole, that was in 1948. In 1951 the legislature changed Section 209 of the Penal Code and made those fellows eligible for parole. That is why I say the penalty of death is the penalty of finality. Some persons earn it. When they earn it, I think they should receive it.*

"Life imprisonment without the possibility of parole, and you have the right to consider these possibilities of both capital punishment and life without parole when you are determining the penalty in this case on these five counts where it is involved, *life imprisonment without the possibility of parole, yes, that is what the statute says, but it can be changed; there can be a pardon by the Governor. The Governor at any time can commute the sentence of that individual. Oh, I don't say it would be done now or next year, but 10 or 15 years from now I will be a has-been, there will be another Governor; there will be another group of people in law enforcement, they will probably have forgotten all about the seriousness and the manner in which the women were attacked. Sure, you have people right up there in the legislature today attempting, under certain circum-*

stances to have a moratorium or abolish capital punishment. I bet it will never get by the Senate." [R. Folder H, R. T. Vol. VII, pp. 1331-1333; emphasis ours.]

7. Further on, the prosecutor said in his closing remarks:

"Mr. Leavy: *I have only one regret in arguing this case to you, and that is that under the laws of this State, for the reason that the defendant did not announce as his purpose robbery at any time to Karen Stokes, that I cannot charge him with kidnapping for the purpose of robbery with bodily harm and ask you to return a sixth verdict of death. That is the only regret I have. To do that child what this man did to that child to me is beyond comprehension. I urge you to impose the proper penalties in this case, folks. I am finished."* [R. Folder H, R. T. Vol. VII, p. 1340; emphasis ours.]